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January 6, 2009

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: *In the Matter of Herring Broadcasting, Inc d/b/a WealthTV v. Time Warner Cable Inc.*, et al., MB Docket No. 08-214

Dear Ms. Dortch:

Please find enclosed the original and four copies of **Joint Opposition of Complainants Herring Broadcasting, Inc. d/b/a WealthTV and TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network to Defendants' Emergency Application for Review** and **Joint Opposition of Complainants Herring Broadcasting, Inc. d/b/a WealthTV and TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network to Defendants' Emergency Motion for Stay** being filed on behalf of TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network and Herring Broadcasting, Inc. d/b/a WealthTV in the above-captioned docket.

Thank you for your assistance in this matter.

Respectfully submitted,

David C. Frederick

Enclosures

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matters of	)	MB Docket No. 08-214
	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7709-P
Complainant	)	
v.	)	
Time Warner Cable Inc.	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7822-P
Complainant	)	
v.	)	
Bright House Networks, LLC,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7829-P
Complainant	)	
v.	)	
Cox Communications, Inc.,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7907-P
Complainant	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	
	)	
TCR Sports Broadcasting Holding, L.L.P.,	)	File No. CSR-8001-P
d/b/a Mid-Atlantic Sports Network,	)	
Complaint	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	

To: The Commission

JOINT OPPOSITION OF COMPLAINANTS HERRING BROADCASTING, INC. D/B/A WEALTHTV AND TCR SPORTS BROADCASTING HOLDING, L.L.P. D/B/A MID-ATLANTIC SPORTS NETWORK TO DEFENDANTS' EMERGENCY APPLICATION FOR REVIEW

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SUMMARY AND INTRODUCTION

The Commission should reject the Emergency Application for Review ("Application") filed by Comcast Corporation ("Comcast"), Cox Communications, Inc., Bright House Networks, LLC, and Time Warner Cable Inc. ("TWC") (collectively, "Defendants"). The Application is both procedurally defective and without substantive merit.

Defendants seek review of a Media Bureau ("Bureau") order reclaiming jurisdiction over complaints brought by TCR Sports Broadcasting Holding, L.L.P, doing business as Mid-Atlantic Sports Network ("MASN"), and Herring Broadcasting, Inc., doing business as WealthTV ("WealthTV"), against Defendants pursuant to the program carriage provisions of the Cable Act. Those provisions prohibit affiliation-based discrimination by cable operators and require "expedited review" of complaints alleging such discrimination. Acting under delegated authority, the Bureau found that the complaints of MASN and Wealth TV established a *prima facie* case of discrimination, and delegated the matters to an Administrative Law Judge ("ALJ") to resolve certain narrow factual issues. The Bureau conditioned that delegation on the ALJ issuing a recommended decision within 60 days. The ALJ made no attempt to comply with this mandatory deadline and also decided that he would not limit his review to the narrow unresolved issues, but would instead require re-litigation of all issues from scratch. The ALJ, in fact, characterized the Bureau's 60-day deadline as "ludicrous" and set a schedule that called for a hearing three months after expiration of the 60 days with no indication as to the length of the hearing and no limit on the issuance of a recommended decision. MASN and WealthTV accordingly filed petitions requesting that the Bureau reconsider its order designating the complaints for an ALJ hearing and re-claim jurisdiction over the disputes due to the ALJ's refusal to honor the mandatory terms of the *Hearing Designation Order*, DA 08-2269 (MB rel. Oct. 10, 2008), as modified by *erratum* adopted and released October 15, 2008 ("*HDO*"). The

Bureau subsequently held – based on its interpretation of the *HDO* – that the ALJ's delegated authority necessarily expired at the end of the 60-day period set forth in the *HDO* that vested jurisdiction with the ALJ in the first instance. Defendants now appeal that determination and seek to have the ALJ continue proceedings according to the drawn-out schedule he adopted.

As an initial matter, the Application is procedurally defective because it seeks improper interlocutory review of a non-merits order of the Bureau. The Commission's rules provide that review of interlocutory rulings is appropriate only after a decision on the merits by the staff. The Bureau's order reclaiming jurisdiction of these proceedings (because the ALJ's authority had expired by the terms of the *HDO*) did not address, let alone decide, the merits of any carriage complaint. The Bureau merely held that the ALJ's authority to consider these matters had expired. Defendants' Application is therefore fatally premature.

The Application also fails on the merits. First, the Bureau was correct in concluding that the ALJ's delegated authority had expired. Within its authority over program-carriage matters, the Bureau may delegate carriage proceedings – or discrete issues in carriage proceedings – to ALJs. In making such delegations, the Bureau has the authority to limit the ALJ's jurisdiction by setting deadlines or imposing other mandatory requirements to structure the ALJ decisional process. Defendants do not seriously dispute that power, but instead argue that the ALJ was not acting pursuant to specific delegated authority from the Bureau, but under general authority pursuant to the Administrative Procedure Act ("APA"). That assertion is incorrect: an ALJ's authority to adjudicate a program-carriage dispute arises only under the Communications Act, not the APA. Moreover, when an ALJ acts pursuant to delegated authority, limitations contained in the designation order granting such authority are mandatory and thus jurisdictional in nature.

Although an ALJ has authority to regulate the course of a proceeding, such authority does not permit him or her to countermand mandatory decisions by the Bureau in a designation order.

Second, the Bureau correctly determined that the *HDO* imposed a strict 60-day deadline here. On this point, the text of the *HDO* is unmistakable: "[W]e *direct* this matter to an ALJ and *order* that the ALJ return a Recommended Decision in this matter[] to the Commission pursuant to the procedures set forth below within 60 days of the release of this *Order*." *E.g.*, *HDO* ¶ 3 (emphases added). Defendants have no real answer to that language and therefore attempt to deflect attention by pointing to Commission decisions in a series of unrelated orders. But each of those orders is easily distinguishable because they contained discretionary language rather than the mandatory language at issue here. In fact, the contrast between the discretionary language in those cases and the mandatory language in the *HDO* supports, not undermines, the Bureau's interpretation of its own order.

Finally, there is no merit to Defendants' claim that they will be denied due process if the Bureau is permitted to resolve the complaints in place of an ALJ. As a preliminary matter, this claim rests on the mistaken assumption that extensive testimony and discovery is necessary to resolve the remaining factual issues. Defendants also wrongly assume that due process requires a "trial-type hearing," which is directly contrary to settled precedent. But even if the Bureau were to determine that further fact-finding were necessary, the Bureau has more than ample tools to conduct such proceedings, including the authority to hear live testimony and to make credibility determinations. In fact, given that the Bureau has greater resources than a single ALJ to ensure full and fair adjudication prior to rendering a decision, Defendants' due process claims get things backwards. In any event, because the Bureau has yet to indicate which of these tools it intends to use to resolve the complaints, Defendants' due process claims are, at best, premature.

Pursuant to 47 C.F.R. § 1.115(d), MASN and WealthTV hereby file this Opposition to the Emergency Application for Review filed by Defendants.

I. BACKGROUND

The *HDO*. On October 10, 2008, the Media Bureau issued the *HDO* in the six disputes at issue here.[1] The *HDO* made factual findings and concluded that each of the Complainant video programmers had established a *prima facie* case that Defendants had discriminated against them on the basis of affiliation in violation of § 616(a)(3) of the Communications Act.[2] The *HDO* also resolved a range of procedural and other questions raised by the parties.[3] The *HDO* then referred certain narrow "factual disputes" to an ALJ to resolve. The *HDO* ordered the ALJ to render a recommended decision to the Commission within 60 days, or no later than December 9, 2008. By imposing a strict 60-day time limit, the Bureau endeavored to honor Congress's intent that carriage proceedings be resolved expeditiously. That time frame was ample in light of the Bureau's resolution of many of the key issues (including, for example, Comcast's assertion that a prior affiliate agreement foreclosed MASN's carriage claims).

On October 15, 2008, the Bureau issued an *Erratum* correcting certain omissions in the *HDO*. Among other things, the *Erratum* made clear that the ALJ's time-bound authority to adjudicate the disputes was limited to resolution of the factual issues catalogued in the *HDO* as

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[1] The *HDO* also concerned a carriage dispute brought by NFL Network against Comcast. NFL Network is not party to this pleading.

[2] *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[3] For instance, the *HDO* rejected Comcast's assertion that MASN's claim was time-barred and precluded under the doctrine of *res judicata* as a result of the parties' prior affiliate agreement. *See HDO* ¶¶ 101-107. In so doing, the Bureau determined that MASN's complaint is "forward-looking" and concerns Comcast's conduct *after* execution of the affiliate agreement, *see id.* ¶¶ 106-107, and rejected Comcast's contention that MASN has somehow waived its statutory rights by executing the agreement, *see id.* ¶ 105.

they relate to whether Defendants discriminated in violation of the Communications Act and what remedy, if any, is required.

Proceedings Before the ALJs. On October 20, 2008, Comcast filed the first of several pleadings designed to stave off expeditious resolution of the disputes, requesting that the ALJ certify certain questions to the Commission. Comcast further requested that all proceedings be halted, including any discovery, pending action on its certification request. On October 23, 2008, nearly two weeks after the *HDO*, ALJ Steinberg issued an order setting a schedule that appeared to hew to the *HDO*'s 60-day requirement. The order stated that no discovery would be permitted in view of the time constraints imposed by the *HDO*. Nearly a month later, on November 20, 2008 – and more than 40 days after the *HDO* – ALJ Steinberg issued a second order reversing his earlier scheduling determinations. Memorandum Opinion and Order, FCC 08M-47, at ¶ 7 & n.8 ("*November 20 Order*"). Among other things, the ALJ now concluded that "[t]he 60-day timeframe set forth in the *HDO* cannot be achieved" by a single ALJ. *Id.* ¶ 7. He further indicated that, rather than limit the hearing to resolution of the narrow disputes not already addressed in the *HDO*, he would require re-litigation of all disputes and would review all evidence *de novo*. The ALJ accordingly determined that "some limited discovery should be undertaken" – even though none of the Defendants had requested discovery while the matters were pending before the Bureau. *Id.*

On November 24, 2008, Chief Administrative Law Judge Richard L. Sippel released an order announcing that ALJ Steinberg would be retiring on January 3, 2009, and that Chief ALJ Sippel would be taking control of the case. On November 25, 2008, Chief ALJ Sippel held a status conference with the parties. At the conference, Chief ALJ Sippel indicated that he, too, would not adhere to the 60-day deadline in the *HDO* and, moreover, that he would not give

weight to the finding in the *HDO* that MASN or WealthTV had established a *prima facie* case of discrimination, thereby ignoring the burden-shifting framework used under the carriage rules. He then set a hearing date of March 17, 2008 – *five months* after the *HDO* – with no indication as to the length of the hearing and no time limit on the issuance of a recommended decision. MASN and WealthTV filed petitions requesting that the Bureau reconsider the *HDO* and re-claim jurisdiction over the disputes due to the ALJ's refusal to honor the *HDO*.

The *Jurisdiction Order*. On December 24, 2008, the Bureau issued the *Jurisdiction Order* finding that the ALJ's limited grant of authority to issue a recommended decision had expired on December 9, 2008. The Bureau thus reclaimed jurisdiction over the disputes and stated that it would proceed to resolve the disputes without the benefit of a recommended decision from the ALJ. The Bureau explained that the ALJ had "no authority to act inconsistently with the terms of the HDO from which he derived his authority," that the mandatory time limit was a "critical component" of the *HDO*, and that the "ALJ's authority . . . [had] expired." *HDO* ¶¶ 15, 16. The Bureau noted that, to the extent the ALJ had determined that a single ALJ could not achieve the 60-day deadline, that was due to his decision to "disregard the facts and conclusions recited in the HDO, and instead give *de novo* consideration to *all* issues in the matter." *Id.* ¶ 17. Finally, the Bureau specifically rejected various arguments raised in Defendants' respective oppositions to the motion for reconsideration, noting that it was invested with the full authority and powers of the Commission in resolving program carriage disputes, and that its decision to refer a matter to an ALJ was entirely discretionary under governing Commission rules. *See id.* ¶ 18.

Defendants' Application for Review. On December 30, 2008, Defendants filed the instant Application. The next day, the Enforcement Bureau filed comments in response to the

Application, noting Defendants had mischaracterized its comments in filings made in this matter. The Enforcement Bureau clarified it had not, contrary to Defendants' representations, taken a position on whether the *HDO*'s deadline was or was not jurisdictional.[4]

II. DEFENDANTS' APPLICATION IS PROCEDURALLY DEFECTIVE

A. The Commission should deny the Application because it seeks improper interlocutory review of a non-merits order of the Bureau. In 1990, the Commission adopted 47 C.F.R. § 76.10 to establish a comprehensive "review process [for] parties following a Bureau ruling," which includes procedures for "interlocutory review, petitions for reconsideration, and applications for review" in "carriage agreement" proceedings. *Part 76 Order*, 14 FCC Rcd 418, ¶ 16 (1999). With respect to applications for review, and subject to narrow exceptions, "no party may seek review of interlocutory rulings until a decision on the merits has been issued by the staff." 47 C.F.R. § 76.10(a)(1); *cf. Second Report and Order*, 9 FCC Rcd 2642, ¶ 23 (1993) ("[i]nterlocutory review shall be permitted only after the staff has ruled on the merits").

That provision applies here and forecloses consideration of the Application. The *Jurisdiction Order* did not address, let alone "decid[e]," "the merits" of any carriage complaint. The Bureau held only that "[t]he ALJ's limited authority to consider these matters" had "expired" and thus that the Bureau would "proceed to resolve the above-captioned program carriage disputes." *Jurisdiction Order* ¶ 2; *see id.* ¶ 20. Review of the *Jurisdiction Order* now is improper; such review must await a final decision on the merits.

Adherence to § 76.10(a)(1) is particularly appropriate here for two reasons. First, as explained below, the principal arguments raised by Defendants are incurably premature – for

[4] That same day, the Bureau also entered an order clarifying it was also reclaiming jurisdiction over the final dispute (involving the NFL Network) to which the Bureau had made a time-bound delegation of authority to the ALJ.

example, it is impossible to address whether the Bureau has deprived Defendants of due process when the Bureau has not yet set forth what process it will afford the parties and when the parties have not participated in that process. *See supra* p. 22. Second, all of the substantive arguments made by Defendants would be rendered moot were the Bureau to decide the carriage complaints *against* MASN or WealthTV. That possibility renders it unnecessary and inefficient to address the merits of the Application now. *See Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (agency decision was not final where separate proceeding could resolve the issues and thus "avoid a piecemeal, duplicative, tactical and unnecessary appeal which . . . consumes limited judicial resources" when issues "may not require adjudication at all") (internal quotation marks and alterations omitted).

B. Recognizing this fatal problem with their Application, Defendants argue – in a footnote (at 1 n.1) -- that the exception to the bar on interlocutory review in § 76.10(a)(2)(i) applies and, alternatively, that this Commission should simply ignore the prohibition against interlocutory review because of the supposed "strong public interest" in sending these cases back to the ALJ. These arguments are unpersuasive.

First, § 76.10(a)(2)(i) is of no help to Defendants. That exception applies only when "the staff's ruling denies or terminates the right of any person to participate as a party to the proceeding." 47 C.F.R. § 76.10(a)(2)(i).[5] Here, by contrast, all of the Defendants will continue to be parties to their respective carriage "proceeding[s]," and thus they will be able to participate

[5] The exception incorporates the practice in federal court that "a denial of intervention is treated as final and appealable" – even though interlocutory. *United States v. AT&T Co.*, 642 F.2d 1285, 1290 (D.C. Cir. 1980). That rule reflects the understanding that errors resulting from improper denial of intervention cannot easily be corrected on review but instead require a redo of an otherwise lawful proceeding *ab initio* to protect the interests of the would-be intervenor. *See* Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3914.18 (2008) (noting "[d]enials of intervention have long been treated differently than other orders" with respect to interlocutory review for these reasons). That purpose has no application here.

in any discovery directed by the Bureau and to file additional papers requested by the Bureau.

Second, and contrary to Defendants' assertion (at 1 n.1), there is no "public interest" in declining to apply the bar of § 76.10(a)(1) in this case to advance the goal of "procedural regularity." As explained above, there are particularly strong reasons to enforce, not to waive, § 76.10(a)(1) in this case. *See infra* pp. 4-5. Furthermore, as explained below, there was nothing procedurally irregular about the *Jurisdiction Order*: indeed, the only irregularity would have been in allowing a proceeding before the ALJ to extend several months beyond the mandatory deadline set by the Bureau, particularly when such delay was the result of an *ultra vires* decision to disregard the legal conclusions and findings of the Bureau in the *HDO*. *See infra* pp. 6-10. There is therefore no good cause for waiving the Commission's bar on interlocutory review here.

III. THE *JURISDICTION ORDER* CORRECTLY CONCLUDED THAT THE ALJ'S DELEGATED AUTHORITY HAD EXPIRED

A. The Bureau Has Delegated Authority To Set a Jurisdictional Deadline When Delegating Matters To ALJs

1. The Bureau has broad delegated authority to exercise the powers and authority of the full Commission. The Bureau "acts for the Commission under delegated authority[] in," among other things, all "matters pertaining to multichannel video programming distribution." 47 C.F.R. § 0.61. The Commission's rules specifically charge the Bureau with "[a]dminister[ing] and enforc[ing] rules and policies regarding . . . [p]rogram access and carriage." *Id.* § 0.61(f)(7). The Bureau further has expansive authority to "[c]arry out the functions of the Commission under the Communications Act of 1934, as amended." *Id.* § 0.61(k).[6]

[6] There are three limits to the Bureau's delegated authority, none of which is applicable here. *See* 47 C.F.R. § 0.283. Defendants argue (at 10) that the exception for "novel" questions is applicable. But the key issue in the *Jurisdiction Order* is the Bureau's interpretation of its *own* order, which is clearly within its delegated authority.

Within its authority over program-carriage matters, the Bureau may delegate carriage proceedings – or discrete issues in carriage proceedings – to ALJs. *See Part 76 Order* ¶ 11 ("the Commission can refer discrete issues arising out of a proceeding for an adjudicatory hearing before an ALJ"; "the Commission is not limited to referring only entire proceedings for an adjudicatory hearing before an ALJ"); 47 C.F.R. § 76.7(g). Such delegations, however, are committed to the sole "discretion" of the Bureau. 47 C.F.R. § 76.7(g); *Jurisdiction Order* ¶ 5.

The Bureau also has the authority to confine the discretion and powers of an ALJ through determinations made in a designation order. "It is black-letter law that where there has been a thorough consideration of [a] particular question in the designation order, subordinate staff officials such as presiding hearing officials . . . may not reconsider the matter or take any actions inconsistent with the designation order." Decision, *Ft. Collins Telecasters*, 103 F.C.C.2d 978, ¶ 7 (Rev. Bd. 1986) ("*Ft. Collins Decision*") (internal quotation marks and alterations omitted). That rule applies "irrespective of whether the designation order is handed down by the full Commission or – as here – pursuant to a delegated staff authority acting in the name of the Commission." *Id.*; *see also id.* ¶ 7 n.11 (designation order issued by a bureau chief "has the same force and effect as if issued by the full Commission"). It follows from these principles that an ALJ's failure to adhere to the terms of the authority provided in a designation order is "ultra vires" and such actions are void "nunc pro tunc." *Id.* ¶ 8; *see* Memorandum Opinion and Order, *Atlantic Broad. Co.*, 5 F.C.C.2d 717, ¶ 10 (1966); Memorandum Opinion and Order, *Richard L. Oberdorfer*, 2 F.C.C.R. 4464, ¶ 8 n.5 (Rev. Bd. 1987) (determinations in a designation order "b[ind]" an "ALJ"); Memorandum Opinion and Order, *Tequesta Television*, 2 FCC Rcd 41, ¶ 10 (1987) (Commission precedent establishes "that an ALJ may not countermand a designation

order issued under delegated authority as to matters already considered by the delegating authority").

The Bureau, in the exercise of its delegated authority, may also set deadlines for ALJ decisions. As the Commission has explained, "[t]ime limits on the ALJs are permissible." Report and Order, *Hearing Process Order*, 5 FCC Rcd 157, ¶ 40 n.26 (1990).[7] In fact, this Commission imposed a 45-day time limit in an analogous order addressing MASN's previous carriage complaint against Comcast. *See* Memorandum Opinion and Hearing Designation Order, *MASN Order*, 21 FCC Rcd 8989, ¶ 13 (2006). The similar decision by the Bureau in the *HDO* "has the same force and effect as if issued by the full Commission." *Ft. Collins Decision* ¶ 7 n.11. Such deadlines, moreover, limit the delegated "authority" of the ALJ just as do any issues expressly decided in a designation order. Memorandum Opinion and Order, *Rio Grande Broadcasting*, 6 FCC Rcd 7464, ¶ 4 (Rev. Bd. 1991) ("*Rio Grande Order*") (affirming decision of ALJ to deny continuance of hearing set by bureau because "ALJ reasonably concluded that a continuance was beyond his authority" as the request was based on issues considered by bureau). That is especially the case where, as here, the ALJ's actions are based on "explicit . . . dissatisfaction with the Hearing Designation Order." Memorandum Opinion and Order, *Anax Broad. Co.*, 87 F.C.C.2d 483, ¶¶ 11-12 (1981) ("ALJ lacks . . . authority" to countermand decision "by an operating bureau" and finding ALJ had exceeded his "authority" based, in part, on fact "ALJ explicitly voiced his dissatisfaction with the Hearing Designation Order"); *see*

[7] Although the Commission cautioned that such limits should not "unduly interfere with a judge's independence to control the course of the proceeding," *Hearing Process Order* ¶ 40 n.26, nothing about the *HDO*'s deadline interfered with the "course of the proceeding" – the time limit did not regulate the manner of the proceeding and it applied only to when the ALJ should issue a recommended decision. Besides, the ALJ does not sit in review of the *HDO* and any concerns with the length of the deadline imposed simply do not answer the fact that the ALJ's delegated authority terminated when the deadline lapsed.

Application at 1 (quoting ALJ's conclusion that the Bureau's deadline was "'ludicrous'"). Indeed, Chief ALJ Sippel recently released an order suggesting that he considered the Bureau's decision a nullity and ordering the parties to file a report on January 7, 2009.

The Commission's rules confirm that the Commission – and, by extension, the Bureau – has ample authority to structure the ALJ decisional process, including setting deadlines. The Commission, for example, can "specify the day on which and the place at which any hearing is to commence," 47 C.F.R. § 1.253(a), and the timing for the designation of a presiding officer, *see id.* § 1.241(b) (setting a default period that may be modified when "the Commission determines that due and timely execution of its functions requires otherwise"). The Commission's rules further regulate prehearing discovery. *See id.* §§ 1.250, 1.311-.325. The Commission also is empowered to specify the "burden of proof" consistent with the substantive law being adjudicated, *id.* § 1.254; the order of presentation, *see id.* § 1.255; and the contents of recommended decisions, *see id.* § 1.267(b). In recognition of its broad authority, the Commission has adopted numerous procedural deadlines in broadcast proceedings. *See id.* § 1.229(e) (setting deadlines for discovery in broadcast proceedings applicable to "the Commission or delegated authority acting on the motion"); *see also Hearing Process Order* ¶¶ 2, 30 (adopting "procedural and organizational" rules – some which are codified in § 1.229 – to expedite broadcast hearings before the Commission and ALJs).

Finally, the Administrative Procedure Act ("APA") itself recognizes the authority of an agency to impose binding requirements on ALJs. Under the APA, all authority of an ALJ is "[s]ubject to published rules of the agency and within its powers." 5 U.S.C. § 556(c); *see Attorney General's Manual on the Administrative Procedure Act* 75 (1947) ("[t]he phrase 'subject to the published rules of the agency' is intended to make clear the authority of the

agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers," rules to which an ALJ "*must conform*" and for which "*the hearing officer is bound to comply*") (emphases added & citation omitted). It is accordingly "commonly recognized that ALJs are 'entirely subject to the agency on matters of law.'" *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (Ginsburg, R.B., J.) (quoting Antonin Scalia, *The ALJ Fiasco – A Reprise*, 47 U. Chi. L. Rev. 57, 62 (1979)).

Based on that authority, agencies have imposed *mandatory* time limits on decisions by ALJs. *See, e.g.*, 16 C.F.R. § 3.51(a) (Federal Trade Commission's regulation that ALJ "shall file an initial decision within ninety (90) days after closing the hearing" and "[i]n no event shall the initial decision be filed any later than one (1) year after the issuance of the administrative compliant [sic]"); Morell E. Mullins, *Manual For Administrative Law Judges: 2001 Interim Internet Edition* 66 ("To speed up administrative proceedings, Congress by statute, and some agencies by regulation, have sometimes imposed time limits for completion of some or all of the steps in formal administrative proceedings.") (footnotes omitted). Such deadlines have also been imposed by federal courts. *See Butts v. Barnhart*, 388 F.3d 377, 387 (2d Cir. 2004).

In short, Commission rules and precedent, as well as the APA and the practice of other agencies, establish that an agency may impose deadlines on an ALJ.

2. Defendants' arguments that the Bureau had no authority to set a deadline that confined the delegated authority of the ALJ are unavailing. *First*, in an attempt to sidestep the principle that a subordinate actor has only the authority bestowed by the terms of a delegation, Defendants erroneously insist (at 12) that the ALJ was not "acting pursuant to 'delegated authority' from the Media Bureau." The only support Defendants cite is a note to 47 C.F.R. § 0.201(a)(2), which provides that ALJs have authority under the APA to rule on interlocutory

matters in hearing proceedings. The note says nothing about whether, *in adjudicating a particular case under the Communications Act*, an ALJ would have authority to act inconsistently with the delegated authority provided by a designation order. An ALJ's authority to adjudicate a program-carriage dispute does not arise from the APA, but instead derives from the Commission's authority under § 616 of the Communications Act (the enforcement of which has been delegated to the Bureau). *See* 5 U.S.C. § 556(c) (all ALJ authority is "[s]ubject to published rules of the agency and within its powers"); Report and Order, *Carrier Hearing Order*, 12 FCC Rcd 22497, ¶ 133 (1997) ("ALJ[s]" act on "delegated authority" when enforcing the Communications Act); Memorandum Opinion and Order, *Western Union Telegraph Co.*, 89 F.C.C.2d 538, ¶ 3 (1982) (noting the Commission had "*delegated authority* to the ALJ") (emphasis added); Memorandum Opinion and Order, *Mad River Broad. Co.*, 97 F.C.C.2d 679, ¶ 4 (Rev. Bd. 1984) (concluding "ALJ was acting well within his *delegated authority* in dismissing" an application) (emphasis added).[8] The unstated premise of Defendants' argument – that ALJs have free-standing authority to adjudicate and thus to enforce the Communications Act absent any delegation of authority from the Commission – finds no support in law.

[8] That is so even when a "Bureau" acting on behalf of the Commission has "delegate[d] . . . factual issues for hearing" "before an ALJ." *Carrier Hearing Order* ¶ 135. Indeed, the part of the Commission's rules providing for review of ALJ decisions is styled "[a]pplication for review of action taken pursuant to delegated authority." 47 C.F.R. § 1.115 (title). And, in the *Hearing Process Order*, the Commission "determined that . . . ALJs will have the authority to impose forfeitures up to the statutory maximum amount" under 47 U.S.C. § 503(b)(2)(A), *Hearing Process Order* ¶ 51 – making clear the Commission may expand – and, as a corollary, cabin – ALJ authority. *See Government of Territory of Guam v. Sea-Land Serv. Inc.*, 958 F.2d 1150, 1153-54 (D.C. Cir. 1992) (rejecting argument ALJ "acted without authority" in issuing subpoena because ALJ was acting on "delegated authority from the [Federal Maritime Commission]").

Second, Defendants argue (at 11) that "[t]he Commission's rules provide the Presiding Judge with plenary authority to continue the hearing and issue a decision in the case."[9] Whatever authority an ALJ has to regulate the course of a proceeding under 47 C.F.R. §§ 1.243 or 0.341 (or elsewhere), however, does not include the authority to countermand mandatory decisions by the Bureau in a designation order – such as a deadline on the issuance of a recommended decision. *See Rio Grande Order* ¶ 4 (it was "beyond [the] authority" of an ALJ to grant continuance based on issues considered in designation order); *Ft. Collins Decision* ¶¶ 7-8 (ALJ action inconsistent with designation order is "ultra vires"). As explained, it is settled that the Commission, and thus the Bureau acting on delegated authority, *see* 47 U.S.C. § 155(c), can impose limits on the powers of the ALJ and establish rules for the hearing process. *See supra* pp. 6-10; *see also* 5 U.S.C. § 556(c). Furthermore, the full Commission's imposition of a deadline for ALJ review in the *MASN Order* negates any notion the Commission's rules require the Commission to bestow unexpiring authority on an ALJ every time that it designates a matter for hearing. *See MASN Order* ¶ 13; *see also Barnhart v. Peabody Coal*, 537 U.S. 149, 157-58, & 159 n.6 (2003) (noting agency "had no discretion" to ignore mandatory deadline and that failure to meet deadline "represent[ed] a default on a statutory duty" and accepting proposition that "when a power is conferred for a limited time, the *automatic* consequence of the expiration of that time is the expiration of the power") (internal quotation marks and alterations omitted).

Third, Defendants maintain (at 12) that the *Jurisdiction Order* is unlawful because the Bureau "critique[d] [the ALJ's] rulings on the merits," thus purportedly establishing that the

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[9] Defendants' reliance on language about the authority of ALJs to regulate the course of hearings is ironic given that the Commission has used such language in reference to the need for ALJs to *expedite* hearings. *See, e.g.*, Memorandum Opinion and Order, *LRB Broad.*, 7 FCC Rcd 6459,¶ 2 (Rev. Bd. 1992) (explaining "concern[s] about delays" in the hearing process led the Commission to "reaffirm[]" discretion of "ALJs to regulate" hearings).

Jurisdiction Order's purpose was something other than confirming that the ALJ's authority had expired. But Defendants mischaracterize the *Jurisdiction Order*. The Bureau noted that the ALJ had "greatly expanded the designated issues for hearing," *Jurisdiction Order* ¶ 16, in the course of explaining why the ALJ's explanation for disregarding the mandatory deadline was not a reasonable excuse for exceeding his delegated authority. But the Bureau did not purport to sit in review of any decision of the ALJ; indeed, as the Bureau noted, "the ALJ ha[d] not issued any decision . . . to review." *Id.* ¶ 18 n.60. The Bureau was clear that the outcome of the *Jurisdiction Order* did not turn on the reasonableness (or lack thereof) of the 60-day deadline or the merits of any ALJ decision but rather on the fact "the ALJ's authority to issue a recommended decision in these proceedings expired." *Id.* ¶ 16.

B. The Bureau's Interpretation of the *HDO* Is Lawful

1. Because the Commission and the Bureau have the authority to impose mandatory time limits on the exercise of the ALJ's authority, the only remaining issue is whether the Bureau properly interpreted the *HDO* as imposing such a deadline here. On that question of the *HDO*'s intended effect, the Bureau is entitled to substantial deference. This Commission's "interpretation of the intended effect of its own orders is controlling unless clearly erroneous." *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 547 (D.C. Cir. 2001) (internal quotation marks omitted). So, too, the Bureau's interpretation of its own order should be afforded substantial deference. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *cf.* Decision, *Otis L. Hale*, 95 F.C.C.2d 668, ¶ 3 n.2 (Rev. Bd. 1983) (deferring to "reasonable interpretation of the hearing designation order" by a bureau), *aff'd*, 778 F.2d 889 (D.C. Cir. 1985) (table). Regardless of the standard of review, however, the *HDO* is best read as establishing a deadline limiting the ALJ's delegated authority over MASN's and WealthTV's carriage complaints.

In the *HDO*, the Bureau made detailed and extensive findings that MASN and WealthTV had made *prima facie* cases of discrimination under the Cable Act's program-carriage provision, which required the Commission to adopt regulations prohibiting affiliation-based "discriminati[on]," 47 U.S.C. § 536(a)(3), and to put in place procedures for "expedited review" of carriage complaints, *id.* § 536(a)(4). *See HDO* ¶¶ 8-58, 90-119. The Bureau also rejected several procedural defenses raised by Defendants. The Bureau – in its "discretion," 47 C.F.R. § 76.7(g) – decided not to resolve all issues of fact, but instead to delegate certain factual issues to an ALJ. *See HDO* ¶ 120.

Because the remaining fact issues were narrow and to give effect to the statutory command that carriage complaints be resolved "expedit[iously]," the Bureau conditioned its delegation on the ALJ issuing a recommended decision within 60 days. The Bureau couched that instruction in mandatory language: "[W]e *direct* this matter to an ALJ and *order* that the ALJ return a Recommended Decision in this matter[] to the Commission pursuant to the procedures set forth below within 60 days of the release of this *Order*." *HDO* ¶ 3 (emphases added); *see also id.* ¶ 124 ("[ALJ] within 60 days of this *Order*, *will* resolve all factual disputes and submit a recommended decision") (emphasis added). To drive home the importance of this directive, the Bureau referenced the deadline no fewer than 14 times. *See id.* ¶¶ 1-3, 58, 85, 89, 119, 120, 124, 128, 132, 136, 140, 144. The Bureau's repeated references to a mandatory time limit alone support the conclusion that "[t]he expedited deadline for issuing the recommended decision was a critical component of the HDO." *Jurisdiction Order* ¶ 15.

Two additional points further confirm the jurisdictional nature of the 60-day deadline. *First*, the Bureau adopted specific tolling provisions to accommodate ADR election. The Bureau explained that, "[i]f the parties elect to resolve the dispute though ADR, the 60-day period for

review by an [ALJ] will be tolled" and the time period "will resume upon receipt" of written notification of the failure of ADR to resolve the dispute. *HDO* ¶ 120; *see id.* ¶¶ 125, 129, 133, 137, 141, 145. If the 60-day time limit were merely aspirational, rather than jurisdictional, the tolling provisions would have been superfluous because the ALJ would have been free to disregard the time limit in any circumstance. That "[s]tructural clue[]" supports a jurisdictional reading of the *HDO*. *Peabody Coal*, 537 U.S. at 161.

Second, a previous Bureau order delegating a carriage complaint to an ALJ did *not* include any time limit, let alone one couched in non-discretionary terms. *See* Memorandum Opinion and Hearing Designation Order, *Classic Sports Network, Inc. v. Cablevision Systems Corp.*, 12 FCC Rcd 10288, ¶ 11 (1997) (ordering carriage proceeding to an ALJ but not imposing any deadline). That contrast supports the conclusion that the *HDO*'s inclusion of a deadline was intentional and meaningful. Furthermore, as Defendants acknowledge (at 15 n.61), the Commission and the Bureau know how to make time limits on ALJs aspirational and do so by using language of "recommended deadline[s]." And, as explained below, the Commission included a provision allowing the modification of time limits in the *Adelphia Order*. *See infra* pp. 16-17. The Bureau's failure to include either aspirational language or a provision for allowing modification of the deadline in the *HDO* must be presumed to be intentional, supporting the conclusion that the deadline was mandatory. *Accord Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

2. Defendants have failed to demonstrate that the Bureau's interpretation of the *HDO* is "clearly erroneous." *MCI Worldcom Network Servs.*, 274 F.3d at 547 (internal quotation

marks omitted); *see also id.* at 548 (agency interpretation of "its own orders" receives a "presumption of validity and [a] high level of deference"). *First*, Defendants argue (at 13-14) that "[t]he timing of the Media Bureau's actions alone suggests that the Media Bureau's interpretation of the *HDO* is a *post hoc* effort to undo those ALJ decisions it does not like." The timing suggests nothing of the sort. The Bureau was not a party to the ALJ proceeding. MASN and WealthTV filed motions with the Bureau – bringing to the Bureau's attention that the ALJ had exceeded his delegated authority – when it became evident the ALJ was going to set a schedule with a hearing months beyond the *HDO*'s deadline, with *no* date for the issuance of a recommended decision. Defendants filed responses to those motions, and MASN and WealthTV filed replies. The timing of the *Jurisdiction Order* thus reflects nothing more than the need for the Bureau to afford the parties an opportunity to address these issues and to issue an order explaining why the ALJ's authority had expired. Nothing in that sequence even hints (much less establishes) an improper motive, and Defendants' efforts to posit bad faith on the part of the Bureau on such flimsy reasoning must be rejected. *See FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1091 (D.C. Cir. 1992) (the court has "often said" that "agencies are entitled to a presumption of administrative regularity and good faith") (internal quotation marks omitted).

Second, Defendants maintain (at 14) that the Bureau's decision in the *Jurisdiction Order* cannot be squared with a prior non-decision – the Bureau's failure to conclude that an arbitrator appointed under the *Adelphia Order* (to resolve a dispute between MASN and TWC) exceeded his authority by issuing a recommended decision outside of the 60-day deadline in that order. That argument has no merit. The *Adelphia Order* provided that "[t]he parties may agree to modify any of the time limits" set forth in the order as well as "any of the procedural rules of the arbitration," Memorandum Opinion and Order, *Adelphia Order*, 21 FCC Rcd 8203, App. B.